WAN SAGAR WAN EMBONG A

v.

HARUN TAIB

FEDERAL COURT, PUTRAJAYA B
ALAUDDIN MOHD SHERIFF CJ (M)
ARIFIN ZAKARIA FCJ
ZULKEFLI MAKINUDIN FCJ
[APPEAL NO: 01(F)-2-2008 (T)]
10 JULY 2008 C

ELECTION: *Petition - Dismissal of petition on preliminary objection by election judge - Appeal against dismissal - Whether appealable - Whether decision appealed against related to interlocutory or final matter - Meaning of "trial of an election petition" - Election Offences Act 1954, ss. 33(4), 36, 36A* D

CONSTITUTIONAL LAW: *Election - Election petition - Dismissal of petition on preliminary objection by election judge - Appeal against dismissal - Whether appealable - Whether decision appealed against related to interlocutory or final matter - Meaning of "trial of an election petition" - Election Offences Act 1954, s. 33(4), 36, 36A* E

CIVIL PROCEDURE: *Appeal - Election judge, from - Dismissal of petition on preliminary objection - Whether appealable - Whether decision appealed against related to interlocutory or final matter - Meaning of "trial of an election petition" - Election Offences Act 1954, s. 33(4), 36, 36A* F

WORDS & PHRASES: *"trial of an election petition" - Election Offences Act 1954, s. 36(1) - Meaning to be given* G

The appellant/petitioner stood as a candidate for Barisan Nasional in the general election held on 8 March 2008 for the State Legislative Assembly constituency N. 22, Manir, Terengganu. He lost to the Parti Islam Se Malaysia candidate, the respondent, by a majority of 406 votes. Dissatisfied with the election results, he filed an election petition in the High Court seeking, *inter alia*, the following reliefs: (i) a declaration that the election for State Assembly Seat N. 22, Manir, Terengganu held on 8 March 2008 be declared invalid and void; (ii) a declaration that the respondent H I

A was not duly elected or ought not to have been returned at such election; and (iii) a determination and direction pursuant to s. 36 of the Election Offences Act 1954 ('Act'). At the hearing of the petition, the respondent raised five grounds as a preliminary objection. The election judge ('EJ') upheld the preliminary B objection and ordered that the petition be struck out. This was the appeal by the petitioner against that decision. The respondent raised a preliminary objection against this appeal on the ground that since the decision of the EJ appealed against in this case related to an interlocutory matter, it therefore followed that the C decision was final and not appealable. He relied primarily on the provision of s. 33(4) of the Act and the decision of this court in *Gan Joon Zin v. Fong Kui Lun & Ors* to support his contention. The principal issue arising from the preliminary objection was whether an appeal would lie against the decision of the EJ in D ordering the petition to be struck out based on the preliminary objection raised by the respondent.

Held (dismissing the respondent's preliminary objection)
Per Arifin Zakaria FCJ delivering the judgment of the court:

E **(1)** The words "trial of an election petition" ought to be given a broad meaning, that is, a trial of any issue relating to the petition, be it by way of a preliminary issue, and having determined the said issue, the EJ is not bound to proceed to F hear the remaining issue or issues. As in the instant case, the EJ had allowed the preliminary objection taken up by the respondent at the outset of the hearing and on that basis, the petition was struck out. That was a trial of the election petition filed by the petitioner since it could not be denied G that the EJ had, in so doing, tried the issue before him. And by ordering that the petition be struck out, the EJ had brought the election petition to its conclusion. In the circumstances, s. 36 of the Act would apply. And by the same token, the EJ ought to have: (a) made a determination whether the H candidate whose return or election was complained of was duly returned or elected or whether the election was void; and (b) pronounced such determination in open court. Further support for this view may be found in s. 36A(1) of the Act itself, which provides that a petitioner or a candidate whose I return or election is complained of may appeal against the determination of an EJ to the Federal Court. Clearly, the order

by the EJ striking out the petition was a determination within the meaning of the said section and, hence, was appealable. Furthermore, as noted by this court in *Gan Joon Zin (supra)*, the conclusion reached by this court in that case could lead to an anomalous result in that when a judge strikes out a petition without a trial and without hearing evidence, but purely on a procedural defect, the order is not appealable; but when a case is decided after what is commonly referred to as a "full trial", then it is appealable. Indeed, the interpretation given by this court in *Gan Joon Zin (supra)* could lead to such a curious result, which could not have been the intention of the legislature. In the result, the petitioner had a right of appeal under s. 36A of the Act. *Om Prabha Jain, Appellant v. Gian Chand and another, Respondents* (foll); *Gan Joon Zin v. Fong Kui Lun & Ors* (not foll). (paras 29, 30, 31 & 32)

Bahasa Malaysia *Translation Of Headnotes*

Perayu/pempetisyen bertanding sebagai seorang calon dalam pilihanraya umum yang diadakan pada 8 Mac 2008 bagi kawasan Dewan Undangan Negeri N. 22, Manir, Terengganu. Beliau kalah kepada responden, calon Parti Islam Se Malaysia, dengan undi majoriti 406 undi. Tidak berpuashati dengan keputusan, beliau memfailkan petisyen pilihanraya antara lain menuntut relif-relif berikut: (i) deklarasi bahawa pilihanraya bagi Kerusi Dewan Undangan Negeri N. 22, Manir, Terengganu yang diadakan pada 8 Mac 2008 diisytiharkan tak sah dan batal; (ii) deklarasi bahawa responden tidak dipilih atau tidak seharusnya diisytiharkan menang di pilihanraya tersebut; dan (iii) satu ketetapan dan arahan di bawah s. 36 Akta Kesalahan Pilihanraya 1954 ('Akta'). Di pendengaran petisyen, responden membangkitkan lima alasan melalui bantahan awal. Hakim pilihanraya ('EJ') membenarkan bantahan awal dan sekaligus memerintahkan petisyen dibatalkan. Ini adalah rayuan pempetisyen terhadap keputusan itu. Responden menentang rayuan dan membangkitkan bantahan awal atas alasan bahawa, oleh kerana keputusan EJ yang dirayui di sini berkaitan dengan satu persoalan interlokutori, maka keputusannya itu adalah muktamad dan tidak boleh dirayui. Bagi menyokong hujahnya, responden secara pentingnya bergantung kepada peruntukan s. 33(4) Akta serta keputusan mahkamah ini di dalam *Gan Joon Zin v. Fong Kui Lun & Ors*. Isu utama yang berbangkit adalah sama

ada suatu rayuan boleh dibuat terhadap keputusan EJ kerana memerintahkan pembatalan petisyen berdasarkan bantahan awal yang dibuat oleh responden.

Diputuskan (menolak bantahan awal responden)

Oleh Arifin Zakaria HMP menyampaikan penghakiman mahkamah:

(1) Perkataan "perbicaraan suatu petisyen pilihanraya" harus diberikan makna yang luas, iaitu perbicaraan mana-mana isu berkaitan petisyen, tidak kira sama ada ianya satu isu awalan, di mana setelah memutuskannya, EJ tidak lagi terikat untuk mendengar isu atau isu-isu lain. Seperti yang berlaku di sini, EJ telah membenarkan bantahan awal yang dibuat oleh responden di permulaan pendengaran dan atas alasan itu telah membatalkan petisyen. Itu adalah perbicaraan petisyen pilihanraya yang difailkan oleh pempetisyen, oleh kerana EJ, dengan berbuat demikian, telah pun membicarakan isu yang ada di hadapannya. Dan dengan memerintahkan petisyen dibatalkan, EJ telah menutup petisyen pilihanraya tersebut dengan muktamadnya. Dalam keadaan sedemikian, s. 36 Akta adalah terpakai. Berdasarkan kedudukan ini, EJ sepatutnya turut sama: (a) memutuskan sama ada calon yang dipilih atau diisytiharkan menang itu telah dipilih atau diisytiharkan menang dengan sewajarnya atau sama ada pilihanraya itu batal; (b) mengisytiharkan keputusannya itu di mahkamah terbuka. Sokongan lanjut terhadap dapatan ini boleh didapati dari s. 36A(1) Akta itu sendiri, yang memperuntukkan bahawa seorang pempetisyen atau calon yang pemilihan atau kemenangannya dibantah boleh merayu terhadap keputusan EJ ke Mahkamah Persekutuan. Jelas bahawa perintah EJ membatalkan petisyen adalah satu keputusan seperti yang dimaksudkan seksyen tersebut, dan dengan itu adalah boleh dirayui. Selain itu, seperti yang dikatakan oleh mahkamah ini di dalam *Gan Joon Zin (supra)*, konklusi yang dicapai oleh mahkamah ini di dalam kes tersebut boleh membawa kepada keputusan-keputusan beranomali dalam ertikata apabila seseorang hakim membatalkan petisyen tanpa perbicaraan dan tanpa mendengar keterangan-keterangan, dan semata-mata berdasarkan kecacatan prosedur, maka perintahnya adalah tidak boleh dirayui; sedangkan jika ia diputuskan selepas apa yang biasanya dipanggil satu "perbicaraan penuh" maka ianya

boleh pula dirayui. Interpretasi seperti yang diberikan oleh mahkamah ini di dalam *Gan Joon Zin (supra)* boleh membawa kepada akibat pelik sebegini di mana itu bukanlah apa yang diniatkan oleh Parlimen. Maka pempetisyen mempunyai hak untuk merayu di bawah s. 36A Akta. *Om Prabha Jain, Appellant v. Gian Chand and another, Respondents* (diikuti); *Gan Joon Zin v. Fong Kui Lun & Ors* (tidak diikuti).

Case(s) referred to:

Auto Dunia Sdn Bhd v. Wong Sai Fatt & Ors [1995] 3 CLJ 485 FC ***(refd)***
Bozson v. Altrincham Urban District Council [1903] 1 KB 547 ***(refd)***
Dason Gaben v. Zulkifli Majun & Ors [1982] 1 MLJ 31 ***(refd)***
Devan Nair v. Yong Kuan Teik [1967] 1 MLJ 261 ***(refd)***
Gan Joon Zin v. Fong Kui Lun & Ors [2004] 4 CLJ 729 FC ***(not foll)***
Gee Siew Yee v. Ann Wam Tiang [2008] 1 CLJ 229 CA ***(refd)***
Hari Vishnu Kamath, Petitioner v. Election Tribunal, Jabalpur and another, Respondents AIR [1958] MP 168 ***(refd)***
Haron Md Zaid v. Central Securities (Holdings) Bhd [1982] CLJ 293; [1982] CLJ (Rep) 26 PC ***(refd)***
Hong Hock Trading & Co v. Carseng Manufacturing (M) Sdn Bhd [2002] MLJU 642 ***(refd)***
Mills v. Commonwealth 20075/00, 2003 NSWSC 1053 ***(refd)***
Om Prabha Jain, Appellant v. Gian Chand and another, Respondents AIR [1959] Supreme Court, 837 ***(foll)***
Peninsular Land Development Sdn Bhd v. K Ahmad (No 2) [1970] 1 MLJ 253 ***(refd)***
PP v. Utrakumaran Samivel [2006] MLJU 441 ***(refd)***
Ratnam v. Cumarasamy & Anor [1962] 28 MLJ 330 ***(refd)***
Re Perting Timor Election No 2 [1962] 28 MLJ 333 ***(refd)***
Re Sarjit Singh Khaira [1995] MLJU 266 ***(refd)***
Sajjansingh & Anor, petitioners v. Bhogilal Pandya & Anor, non-petitioner AIR [1958] Raj 307 ***(refd)***
Tetuan J & S Holdings Sdn Bhd v. A Karim Hasan & Anor [2000] 4 CLJ 152 HC ***(refd)***
Woznick v. Woznick [1953] 1 All ER 1192 ***(refd)***

Legislation referred to:

Election Offences Act 1954, ss. 33(4), 36, 36A(1), 90(1)

Representation of the People Act 1951 [Ind], s. 98

Other source(s) referred to:

Halsbury's Laws of England, 4th edn, para 506
The Oxford English Dictionary, 2nd edn, vol XVII

A *For the appellant - Firoz Hussein Ahmad Jamaluddin (Mohd Hafanizam Harun, Cheng Mai, Shamshawal Azraai Ahmad, Nik Mohd Nasir Nik Hussin, Muhammad Rafaei Adnan, Julita Ilhani Abdul Jabbar & Syed Faisal Syed Abdullah with him); M/s Ahmad Shahabuddin & Co*

For the respondent - Dato' Wan Abd Muttalib Embong (Saifuddin Othman,
B *Mohd Kamaruzaman Abd Wahab, Zulkarnain Lokman, Zabidi Yusuf, Hj Mohd Arif Yusuf, Mohamad Hanifa Maidin, Abd Haris Malek, Hj Radzi Mustafa & Syed Zakaria Syed Zainal Abidin with him); M/s Wan Abdul Mutalib & Co*

[Appeal from High Court, Kuala Terengganu; Election Petition No: 03-2008]

C *Reported by Suresh Nathan*

JUDGMENT

D **Arifin Zakaria FCJ:**

Background Facts

[1] The appellant (petitioner in the court below and in this
E judgment will also be referred to as "the petitioner") stood as a candidate for Barisan Nasional in the recent general election, held on 8 March 2008 for the State Legislative Assembly constituency N. 22, Manir, Terengganu. He lost to the Parti Islam Se Malaysia candidate, the respondent in the present appeal, by a majority of
F 406 votes. Dissatisfied with the said election result he filed an election petition at the High Court at Kuala Terengganu seeking the following reliefs:

1. A declaration that the election for State Assembly Seat N.
G 22 Manir, Terengganu, held on 8 March 2008 be declared invalid and void;

2. For a declaration that the respondent was not duly elected or ought not to have been returned at such election;

H 3. A determination and direction pursuant to s. 36 of the Election Offences Act 1954 ("the Act");

4. Further other reliefs as the court deems fit;

5. Costs of the petition.

I

[2] At the hearing of the petition learned counsel for the respondent raised five grounds as preliminary objection. Having heard submissions of parties the learned election judge, upheld the preliminary objection and ordered that the petition be struck out with costs.

[3] This is the appeal by the petitioner against the decision of the learned election judge. We first heard the appeal on 13 June 2008. At that hearing learned counsel for the respondent, En. Saifudin bin Othman, raised a preliminary objection against this appeal on the ground that, since the decision of the learned election judge appealed against in this case relates to an interlocutory matter, it therefore follows that the decision is final and not appealable. He relied primarily on the provision of s. 33(4) of the Act and the decision of this court in *Gan Joon Zin v. Fong Kui Lun & Ors* [2004] 4 CLJ 729 in support of his contention. In view of the seriousness of the matter at hand and the effect it may have on similar cases pending before the courts throughout the country we directed the parties to take a closer look at the relevant provisions of the Act and in the circumstances we adjourned the hearing to 19 June 2008 for further arguments.

The Issues

[4] The principal issue arising from the preliminary objection is whether an appeal would lie against the decision of the learned election judge in ordering the petition to be struck out based on the preliminary objection raised by the respondent. This issue had come for consideration of this court in the case of *Gan Joon Zin (supra)* which ruled that no appeal would lie to this Court in respect of interlocutory orders including orders striking out of petition which in fact finally disposes off the petition without hearing the merit.

[5] Learned counsel for the petitioner urged upon us to reconsider the correctness of that decision in so far as it relates to striking out order made by the election judge because of the consequence that flows from such an order. He contends that it could not have been the intention of Parliament to shut out the petitioner from appealing against such an order.

[6] Tuan Hj. Mohd. Arif, learned counsel for the respondent in his reply contends that it is trite law that appeal is a creature of statute and the provisions of the Act must be strictly construed. If the Act does not provide for the right of appeal to this court, as in the present case, it is not for this court to do otherwise no matter how grave the consequence may be. That was in fact the view expressed in *Gan Joon Zin* by this court.

[7] We agree with the respondent that an appeal is maintainable where statute and rules of procedure provide for it. Appeal is a right created by statute and the courts cannot create or take away such a right. As was held in *Auto Dunia Sdn. Bhd. v. Wong Sai Fatt & Ors* [1995] 3 CLJ 485, unless an aggrieved party can bring himself within the terms of the statutory provision enabling him to appeal, no appeal would lie.

[8] In the present case we have, therefore, to look at the relevant provisions of the Act to see whether a right of appeal is given to the petitioner in the circumstances of this case. This is governed by Part VII of the Act dealing with election petitions. Section 33 of the Act which comes within this Part relates to appointment of election judge and his powers. Sub-section (4) of s. 33 makes provision for the hearing of interlocutory matters in connection with an election petition by a High Court Judge unless otherwise ordered by the Chief Judge. Therefore, other than in respect of interlocutory matters, election petition may only be dealt with by the Chief Judge or an election judge.

[9] It should be noted that s. 33(4) of the Act further provides that a decision of the court in regard to interlocutory matters in connection with an election petition shall be final. The amendment to s. 33(4) of the Act was introduced by Act A 640 which came into force on 2 May 1986. This put an end to the uncertainty that existed prior to the amendment, whether a decision on interlocutory matter was appealable or not. (See: *Re Perting Timor Election No. 2* [1962] 28 MLJ 333, *Devan Nair v. Yong Kuan Teik* [1967] 1 MLJ 261 (PC) and *Dason Gaben v. Zulkifli bin Majun & Ors.* [1982] 1 MLJ 31 (FC)). Therefore, in so far as decision on interlocutory matters is concerned it is settled that there is no right of appeal.

[10] On the other hand as against the determination of an election judge under s. 36 of the Act no appeal is allowed until the amendment of the Act by Act A 1177 w.e.f. 16 January 2003. This is contained in s. 36A of the Act which reads:

> 36A (1) The petitioner or a candidate whose return or election is complained of may appeal against the determination of an Election Judge to the Federal Court.
>
> (2) Every appeal under this section shall be presented within fourteen days from the date of the determination of the Election Judge under section 36 and such appeal shall be presented in accordance with the rules of court applicable to appeals to the Federal Court.
>
> (3) ...

[11] Hence the right of appeal as conferred by s. 36A(1) is limited to the determination of an election judge under s. 36 of the Act. Section 36(1) provides:

> S. 36(1) at the conclusion of the **trial of an election petition,** the Election Judge shall:
>
> (a) determine whether the candidate whose return or election is complained of was duly returned or elected or whether the election is void; and
>
> (b) pronounce such determination in open court.

[12] Thus according to s. 36(1) the determination under the said section can only be made by the election judge at the conclusion of the trial of an election petition. In the present case the petition was struck out by the election judge on the preliminary objection taken up by the respondent. The issue is can that be regarded as a trial of an election petition?

[13] As we said earlier, this issue had arisen in the case of *Gan Joon Zin (supra)*. This court with the panel comprising of Siti Norma Yaakob, Abdul Hamid Mohamad and Alauddin Mohd. Sheriff, FCJJ (as their Ladyship and Lordships then were) dismissed the appeal in that case on amongst other grounds that the wording of s. 36A of the Act read together with s. 36 clearly shows that an appeal is only available against the determination of the issues provided in para. (a) of s. 36(1) of the Act at the conclusion of the trial of the petition. In the judgment of the

court delivered by Abdul Hamid Mohamad FCJ, it is said that the word "trial" in s. 36(1) can only be interpreted to mean a full trial and the determination of the issues to mean a judgment or decision given after having considered the evidence adduced and the relevant law. The said provision, the court ruled, cannot and should not be stretched to include an order made purely on procedural grounds, on a preliminary objection before the trial begins even though it disposes off the petition.

[14] Learned counsel for the petitioner urged upon us to revisit the issue on the premise that the preliminary objection as in the present case could not be regarded as a mere interlocutory matter as it disposed off the petition. For that reason he contends it is not caught by the bar imposed by s. 33(4) of the Act.

[15] At this juncture it may be appropriate to consider what is meant by interlocutory matter in the context of the s. 33(4) of the Act. *The Oxford English Dictionary*, 2nd edn Vol. XVII states, '"interlocutory" in law means pronounced during the course of an action; not finally decisive of a case or suit; esp. in interlocutory decree, judgment and order. Also relating to a provisional decision in a case.'

[16] *Halsbury's Laws of England*, 4th edn at para. 506 defines the word "interlocutory" to mean:

> An order which does not deal with the final rights of the parties, but either (I) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after judgment, and merely directs how the declarations of right already given in the final judgment are to be worked out, is termed "interlocutory".
>
> An interlocutory order, even though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals.
>
> The phrase "interlocutory judgment" is also used to describe a judgment for damages to be assessed.

[17] In *Bozson v. Altrincham Urban District Council* [1903] 1 KB 547 Lord Alverston CJ, sitting in Court of Appeal, put the test, which later became known as the *Bozson* test in the following words:

> It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order.

[18] This test had been applied by our courts and to name a few, see: *Ratnam v. Cumarasamy & Anor* [1962] 28 MLJ 330; the Federal Court in *Peninsular Land Development Sdn. Bhd. v. K. Ahmad (No. 2)* [1970] 1 MLJ 253; the PC in *Haron bin Md Zaid v. Central Securities (Holdings) Bhd.* [1982] CLJ 293; [1982] CLJ (Rep) 26. As correctly stated by Md. Raus Shariff JCA in the Court of Appeal in *Gee Siew Yee v. Ann Wam Tiang* [2008] 1 CLJ 229 at p 235, in line with the above authorities:

> It is our respectful view that the consent order is in the nature of an interlocutory order as it does not finally determine the dispute between the parties in respect of the subject matter in the suit.

[19] Based on the above, we are of the considered opinion that the order made by the learned election judge in the present case could not be regarded as an interlocutory order as it disposes off the petition.

[20] However, our reading of the judgment of this court in *Gan Joon Zin* is that, it did not at all rule that the preliminary objection in that case is an interlocutory matter and as such caught by the bar under s. 33(4) of the Act. On the contrary it proceeded on the assumption that it is not, otherwise it would not have been necessary for the court to go on to consider s. 36 of the Act and ruled that the determination of the petition based on the preliminary objection raised at the outset of the hearing of the petition, does not come within the ambit of the term "trial of an election petition". This is what it said:

> The provision cannot and should not be stretched to mean an order made purely on procedural grounds on a preliminary objection before the trial even begins, even though it disposes off the petition.

[21] The petitioner contends that this ruling of this court is contrary to the statutory provision itself which speaks of "trial" rather than "full trial" as stated by this court. The learned counsel for the petitioner respectfully submits that the court should not have read into the statute the words "full trial" when the statute only uses the word "trial".

[22] At this juncture it is pertinent to consider what is meant by the word "trial" as found in s. 36. The *Pocket Oxford Dictionary* 8th edn, defines the word "trial" to mean, *inter alia*, – "judicial examination and determination of issues between parties by a judge with or without a jury."

[23] Lord Denning in *Woznick v. Woznick* [1953] 1 All ER 1192 associates the word "trial" with final determination of the matter. In *Mills v. Commonwealth* 20075/00, 2003 NSWSC 1053 Shaw J adopted the meaning of the word "trial" in *Woznick v. Woznick (supra)*, when he said it contemplates a final determination as distinct from a preliminary application. This was followed in the local jurisdiction in the following cases: *Hong Hock Trading & Co. v. Carseng Manufacturing (M) Sdn. Bhd.* [2002] MLJU 642; *PP v. Utrakumaran a/l Samivel* [2006] MLJU 441; *Re Sarjit Singh Khaira* [1995] MLJU 266; *Tetuan J & S Holdings Sdn. Bhd. v. A Karim Hasan & Anor* [2000] 4 CLJ 152.

[24] In the Indian case of *Sajjansingh and another, Petitioners v. Bhogilal Pandya and another, Non-Petitioner* AIR [1958] Raj. 307, I. N. Modi J speaking of the word "trial" said:

> Now it is indeed difficult to define the term "trial" precisely; as a definition given for the purposes of one context may not be found to be satisfactory for another. Broadly speaking, however, a trial is the examination by a competent court of the facts or law in dispute or put in issue in a case. It is the judicial examination of issues between parties whether they are of law or of fact.

[25] In *Hari Vishnu Kamath, Petitioner v. Election Tribunal, Jabalpur and another, Respondents* AIR [1958] MP 168, 173, the court expressed the opinion that, "The word 'trial' undoubtedly has two meanings. It may mean the trial of a controversy that arises from an issue. It may equally mean the trial of an election petition or a complaint or an action from beginning to end. In our opinion, the word used in s. 90(1) of the Act means the latter. In this sense,

which has been approved by their Lordships of the Supreme Court, the word 'trial' covers the entire process of litigation from the acceptance of the election petition for trial to its disposal." [The "Act" here refers to the Representation of the People Act (1951).]

[26] More directly on point would be the decision of the Indian Supreme Court in *Om Prabha Jain, Appellant v. Gian Chand and another, Respondents* AIR [1959] Supreme Court, 837. In that case s. 98 of the Representation of the People Act (1951) came for consideration of the court, which *inter alia* provides:

> Section 98 – Decision of the Tribunal –
>
> **At the conclusion of the trial of an election petition** the Tribunal shall make an order –
>
> (a) dismissing the election petition; or
>
> (b) declaring the election of all or any of the returned candidates to be void; or
>
> (c) declaring the election of all or any of the returned candidates to be void and the petitioner or any other candidate to have been duly elected; (emphasis added.)

[27] Construing this section Sarkar J delivering judgment of the court at p 839 said:

> Therefore it would seem that the sole duty of an Election Tribunal is to try an election petition referred to it. It is an ad hoc body created under s. 86 for this purpose only. When it passes an order which closes the proceedings before it arising out of an election petition, it must be deemed to have tried the petition and passed the order at the conclusion of such trial. It would no less be so when it decides a matter before it and thereby brings the proceedings to a close on one of the several issues raised and does not decide the other issues. In such a case it has made the order after trial of that issue for clearly it cannot make an order on any issue without trying it. It has therefore made the order at the conclusion of the trial held by it. And for this purpose, it makes no difference that the issue tried is of the nature usually called as preliminary issue or that the Tribunal does not consider it necessary to try the remaining issues.

[28] And at p. 840 it said further:

> There is no reason why the Act should provide that a dismissal of an election petition on the merit as it has been called, shall be dealt with by the Act in one way while a dismissal on a preliminary point shall be dealt with differently when the practical result of both kinds of dismissal is the same. We are unable to think that the Act could have intended such a curious result.

[29] As may be noted, s. 98 of the Indian Representation of the People Act employs similar wording as our s. 36(1) of the Act. In the circumstances we are inclined to the view expressed in *Om Prabha Jain (supra)* in that the words "trial of an election petition" ought to be given a broad meaning that is, trial of any issue relating to the petition, be it by way of a preliminary issue, and having determined the said issue, the election judge is not bound to proceed to hear the remaining issue or issues. As in the instant case the election judge had allowed the preliminary objection taken up by the respondent at the outset of the hearing and on that basis the petition was struck out. That, in our opinion, is a trial of the election petition filed by the petitioner, as it cannot be denied that the election judge had, in so doing, tried the issue before him. And by ordering that the petition be struck out the election judge had brought the election petition to its conclusion. In the circumstances we hold that s. 36 of the Act would apply. And by the same token the election judge ought to have:

(a) made a determination whether the candidate whose return or election is complained of was duly returned or elected or whether the election is void; and

(b) pronounced such determination in open court.

[30] Apart from what we have said above, further support for our view may be found in s. 36A(1) itself, which provides that a petitioner or a candidate whose return or election is complained of may appeal against the determination of an election judge to the Federal Court. Clearly the order by the election judge striking out the petition is a determination within the meaning of the said section and hence it is appealable.

[31] Further as noted by this court in *Gan Joon Zin* the conclusion reached by this court in that case could lead to an anomalous result in that, when a judge strikes out a petition without a trial, without hearing evidence, but purely a procedural

defect, the order is not appealable, but when a case is decided after, what is commonly referred to as "a full trial" then it is appealable. Indeed, we agree that the interpretation given by this court in *Gan Joon Zin* could lead to such curious result. We do not think that that could have been the intention of the legislature. For the reasons given above, we are, therefore, constrained to depart from the earlier decision of this court in *Gan Joon Zin.*

The Result

[32] In the result we hold that the petitioner has a right of appeal under s. 36A of the Act and with that the preliminary objection of the respondent is hereby dismissed with costs.